



December 4, 2001

Mr. David A. Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2001-5624

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155655.

The Texas Education Agency (the "agency") received three requests for information regarding complaints, fines, investigations, adverse actions, and compliance surveys of driver safety and training schools. Three subsequent requests modified the original requests. You advise that information responsive to the request for information regarding monetary fines issued against driving schools from January 1, 1996, to date is being released. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code, and under the Family Educational Rights and Privacy Act of 1974. We assume that you have released all other information responsive to the requests. If not, you must do so at this time. *See* Gov't Code §§ 552.301, .302. We have considered the exceptions you claim and reviewed the submitted information.

First, you contend that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with the informer's privilege. Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records

Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. See Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

You represent to us that the Division of Driver Training of the agency is a licensing agency that regulates the commercial driver training industry. The submitted information contains information identifying individuals who have made complaints regarding driver training courses or advertising. You state that the complaints involve violations of article 4413(29)(c) of Vernon's Texas Civil Statutes, and that such violations can result in both civil and criminal penalties. We conclude that you may withhold only the information identifying the complainants, which we have marked, under section 552.101 in conjunction with the informer's privilege.

The submitted documents also contain a driver's license number. Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, you must withhold the driver's license number that we have marked.

Next, you claim that some of the submitted documents are excepted from disclosure under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You explain that the violation assessment worksheets and the marked e-mail contain the advice, opinion, and recommendations of agency staff regarding policy matters, and that the

worksheets are a means to encourage open discussion within the agency in connection with its decision-making processes. Based on your representations and our review of these documents, we conclude that they constitute internal communications consisting of advice, recommendations, and opinions and are therefore excepted from disclosure under section 552.111.

Finally, you claim that you must excise information identifying students of a driving school under the Family Educational Rights and Privacy Act of 1974 ("FERPA"). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). An "educational agency or institution" is defined as "any public or private agency or institution which is the recipient of funds under any applicable program." *Id.* § 1232g(a)(3). The term "student" includes "any person with respect to whom an agency or institution maintains education records or personally identifiable information, but does not include a person who has not been in attendance at such agency or institution." *Id.* § 1232g(a)(6); *see also* 34 C.F.R. § 99.3 (a "student" is an individual who is or has been in attendance at an educational agency or institution and regarding whom the agency or institution maintains education records). The information that you claim is excepted under FERPA relates to individuals who attended the Benavides Driving School, not the agency. Therefore, as to documents created by the agency, we conclude that these individuals are not "students" for purposes of FERPA. Therefore, you may not withhold any information under FERPA.

In summary, you may withhold the information tending to identify individuals who have made complaints involving violations of article 4413(29)(c) of Vernon's Texas Civil Statutes, under section 552.101 of the Government Code. You must withhold the driver's license number under section 552.130. You may withhold the violation assessment worksheets and the e-mail you have marked under section 552.111. You must release the remaining requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates". The signature is fluid and cursive, with the first name "Kristen" written in a larger, more prominent script than the last name "Bates".

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 155655

Enc. Submitted documents

c: Mr. Carlos E. Reyna
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(w/o enclosures)